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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

G.B.,

Defendant and Appellant.

B260623

(Los Angeles County
Super. Ct. No. LA006320)

APPEAL from an order of the Superior Court of Los Angeles County,
James Brandlin, Judge. Affirmed.

Law Offices of Daniel Ritkes and Daniel Ritkes, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Chung L.
Mar, Deputy Attorneys General, for Plaintiff and Respondent.

G.B. appeals from an order denying his petition for a certificate of rehabilitation (Pen. Code, § 4852.01 et seq.)¹ in connection with his 1991 conviction of committing a lewd and lascivious act on a child under the age of 14 (§ 288, subd. (a)). As a result of this conviction, G.B. is required by section 290 to register as a sex offender throughout his lifetime.

Appellant contends that both the mandatory sex offender registration requirement and his statutory ineligibility for a certificate of rehabilitation deny him equal protection of the law. Appellant's challenge to the mandatory registration requirement is not properly before this court. As for appellant's statutory ineligibility for a certificate of rehabilitation, we find no equal protection violation, and thus we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1991, a complaint was filed against appellant alleging three counts of lewd acts on a child under 14 years of age, a felony, in violation of section 288, subdivision (a). The information alleged, with respect to each count, "NOTICE: Conviction of this offense will require you to register pursuant to Penal Code section 290." Appellant pled guilty to count 1 and was sentenced to one year in jail and five years probation. The jail sentence was suspended. The other counts were dismissed.

In 2014, appellant filed a petition for a certificate of rehabilitation under section 4852.01, requesting relief from the obligation to register as a sex offender. The trial court denied the petition on the ground that "an individual convicted of a [section] 288 [violation] is ineligible for the requested relief." Appellant timely appealed.

CONTENTIONS

Appellant contends he has been denied equal protection of the law because his section 288 conviction subjects him to mandatory registration as a sex offender under section 290. Appellant also argues that section 4852.01, subdivision (d), which bars

¹ All further statutory references are to the Penal Code.

section 288 offenders from obtaining certificates of rehabilitation, violates his right to equal protection because similarly situated offenders are eligible for such relief.²

DISCUSSION

1. Scope of Issue Cognizable Before This Court

On appeal, appellant urges that he has been treated differently than persons convicted of engaging in unlawful sexual intercourse with a person under 18 in violation of section 261.5, because those offenders (1) are subject to *discretionary*, rather than *mandatory*, registration, and (2) may receive certificates of rehabilitation on an appropriate showing. For the reasons that follow, we reach only the second issue.³

“[F]or . . . defendant[s] . . . who are no longer in custody and whose appeals are final, claims for . . . relief from mandatory lifetime sex offender registration based on equal protection . . . must be brought *by way of a petition for writ of mandate* in the trial court.” (*People v. Picklesimer* (2010) 48 Cal.4th 330, 335 (*Picklesimer*), italics added.) In the present case, appellant is no longer in custody, and any appeal from his 1991 conviction is final. Therefore, in order to challenge the mandatory sex offender registration requirement, appellant was required to file a petition for writ of mandate.

Appellant did not file a petition for writ of mandate, and thus the constitutional validity of the mandatory sex offender registration requirement was not properly before the trial court in connection with appellant’s petition for a certificate of rehabilitation.⁴

² Appellant also contends the trial court “ha[d] jurisdiction to decide . . . [his] petition for a certificate of rehabilitation.” We agree the trial court had jurisdiction to rule on the petition.

³ Because we conclude that appellant’s equal protection challenge to the registration requirement is not properly before us, we do not reach his argument as to whether *Johnson v. Department of Justice* (2015) 60 Cal.4th 871’s overruling of *People v. Hofsheier* (2006) 37 Cal.4th 1185 should be given retroactive application here.

⁴ We note that the trial court arguably had discretion to treat appellant’s petition for a certificate of rehabilitation as a petition for writ of mandate. (See *Picklesimer*, *supra*, 48 Cal.4th at p. 335, italics added [“A court may *in its discretion* treat . . . a postjudgment motion as a mislabeled petition for writ of mandate.”].) At oral argument, appellant’s counsel asserted that appellant did raise an equal protection challenge to the registration

He is now, in essence, asking the Court of Appeal for the issuance of “a writ directing the Department of Justice to remove [him] from the state sex offender registry.”

(*Picklesimer, supra*, 48 Cal.4th at p. 340.) Even if we exercised our discretion to treat his appeal as a petition for writ of mandate, “[i]f the petition could have been filed first in a lower court, it must explain why the reviewing court should issue the writ as an original matter.” (Cal. Rules of Court, rule 8.486(a)(1).) Appellant has not done so; therefore, we do not reach his equal protection challenge to the sex offender registration requirement.⁵

2. *Standard of Review*

In general, the denial of a petition for a certificate of rehabilitation is reviewed under an abuse of discretion standard. (See *People v. Lockwood* (1998) 66 Cal.App.4th 222, 226.) Here, however, the trial court did not exercise its discretion in weighing the evidence before it because the court found that appellant was ineligible as a matter of law. On review of a constitutional claim on appeal involving purely questions of law, our review is de novo. (See *People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 632.)

3. *Section 288, Subdivision (a), Offenders Are Not Similarly Situated to Section 261.5 Offenders; Therefore, the Certificate of Rehabilitation Law Did Not Deny Appellant Equal Protection of Law*

Under former section 4852.01, subdivision (a), “[a]ny person convicted of a felony who has been released from a state prison or other state penal institution or agency in

requirement in his petition for a certificate of rehabilitation. Although the petition briefly touched on this argument, the People’s opposition argued only that appellant is ineligible for a certificate of rehabilitation under section 4852.01, subdivision (d), and the trial court’s ruling on the petition was also limited to appellant’s ineligibility under section 4852.01. There is no indication the trial court exercised its discretion to treat appellant’s petition as one for writ of mandate seeking relief from the sex offender registration requirement.

⁵ However, we note that our conclusion below—that section 288, subdivision (a), offenders are not similarly situated to section 261.5 offenders—would also defeat this equal protection challenge.

California . . . who has not been incarcerated in a state prison or other state penal institution or agency since his or her release . . . may file the petition [for a certificate of rehabilitation and pardon]” (§ 4852.01, subd. (a).)⁶ However, “[t]his chapter shall not apply to . . . persons convicted of a violation of . . . Section 288” (§ 4852.01, subd. (d).)

Under section 290.5, subdivision (a)(1), “[a] person required to register under Section 290 *for an offense not listed in paragraph (2)*, upon obtaining a certificate of rehabilitation . . . shall be relieved of any further duty to register under Section 290 if he or she is not in custody, on parole, or on probation.” (§ 290.5, subd. (a)(1), italics added.) Paragraph (2) of section 290, subdivision (a) provides that “[a] person required to register under Section 290, upon obtaining a certificate of rehabilitation . . . shall *not* be relieved of the duty to register under Section 290 . . . if his or her conviction is for one of the following offenses: . . . Section 288” (§ 290.5, subd. (a)(2)(M), italics added.)

Under the plain language of section 4852.01, subdivision (d), therefore, appellant is statutorily ineligible from seeking a certificate of rehabilitation as a result of his conviction under section 288, subdivision (a).

Appellant contends that section 4852.01’s provision “barring a certificate of rehabilitation for a [section] 288 conviction violates equal protection because it allows other ‘similarly situated’ persons who have committed more serious crimes”—specifically, defendants who have violated section 261.5—to obtain a certificate. For the reasons that follow, we do not agree.

Section 288, subdivision (a) punishes lewd or lascivious acts by any person on the body of a child *under 14 years of age* done “with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child.” (§ 288, subd. (a).) Section 261.5 prohibits “unlawful sexual intercourse” with a person *under 18 years of age*. (§ 261.5.)

⁶ The trial court’s order denying the petition was based on the 2014 version of this statute, which we quote herein.

“ ‘The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.’ [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but ‘whether they are similarly situated for purposes of the law challenged.’ [Citation.]” (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.)

Appellant’s equal protection claim fails “at the threshold” because he is not similarly situated to a person who violates section 261.5. (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155.) “[C]ourts have uniformly recognized the significance of the victim’s age that defines an offense in determining whether offenders of other statutes are similarly situated and whether there is a rational basis for statutory distinctions between two offenses.” (*People v. Tuck* (2012) 204 Cal.App.4th 724, 734 (*Tuck*).) Here, the victims of a section 288, subdivision (a) crime are younger than 14. Section 261.5, on the other hand, makes it a crime to engage in sexual intercourse with a “person under the age of 18”—it does not require the victim to be under the age of 14. Because a “section 288(a) conviction involves preying on young, vulnerable children,” while a section 261.5 conviction “can involve victims older than 14,” these two categories of offenders are not similarly situated. (*People v. Alvarado* (2010) 187 Cal.App.4th 72, 77 & 79 (*Alvarado*) [section 288, subdivision (a) offenders are not similarly situated to section 261.5 offenders because “[a] section 261.5 offense does not require the victim to be under the age of 14”]; *Tuck, supra*, 204 Cal.App.4th at p. 737 [“persons convicted of violating section 288, subdivision[] (a) . . . are not similarly situated with persons convicted of sex offenses under other statutes that do not require the minor victim to be so young”]; *People v. Singh* (2011) 198 Cal.App.4th 364, 371 (*Singh*) [a section 288, subdivision (a) offender “is not similarly situated to offenders convicted under section 261.5 . . . because [that] provision[] [is] not limited to children under the age of 14”].)

Section 288 also contains a specific intent requirement—it punishes acts done “with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child.” (§ 288, subd. (a).) Section 261.5, on the other hand,

concerns a general intent offense of committing unlawful sexual intercourse. “The higher mental state required for a conviction under section 288 is a distinction that is meaningful in deciding whether a person convicted under that statute is similarly situated with one convicted under section 261.5.” (*People v. Cavallaro* (2009) 178 Cal.App.4th 103, 114.) Accordingly, appellant is not similarly situated to offenders convicted under section 261.5 on the additional ground that section 288 contains a specific intent requirement, while section 261.5 involves a general intent offense. (See *Singh, supra*, 198 Cal.App.4th at p. 371 [a section 288, subdivision (a) offender “is not similarly situated to offenders convicted under section 261.5 . . . because [the latter] provision[] . . . [is a] general intent offense[].”]; *Alvarado, supra*, 187 Cal.App.4th at p. 79 [section 288, subdivision (a) offenders are not similarly situated to section 261.5 offenders because “[a] section 261.5 offense . . . concerns the general intent offense of committing unlawful sexual intercourse.”].)

In sum, persons convicted of violating section 288, subdivision (a) are not similarly situated to those convicted of violating section 261.5. Thus, section 288, subdivision (a) offenders and section 261.5 offenders are not “sufficiently similar to merit application of some level of scrutiny to determine whether distinctions between the two groups justify the unequal treatment.” (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 715.) Because appellant, as a section 288, subdivision (a) offender, is not similarly situated to a section 261.5 offender, his equal protection challenge fails at the threshold level.

DISPOSITION

The order denying the petition for a certificate of rehabilitation is affirmed.

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EDMON, P. J.

We concur:

LAVIN, J.

HOGUE, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.